

(...)

(...)

23rd August 2006

TO: Parliament of Australia
Joint Committee

ATT: Senator Grant Chapman, Chairman

EMAIL: corporations.joint@aph.gov.au

Dear Mr Chapman

I wish to draw the committee's attention to ASIC's Act 2001, Section 243 – Duties.

The Parliamentary Committee's duties are:

- (a) to inquire into, and report to both Houses on:
 - (i) activities of ASIC or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed.
(ASIC is a regulator, not the legislator.)

On 21st August 2006 (Case Reference No. V2006/566) ASIC successfully challenged the Administrative Appeals Tribunal's jurisdiction to review a decision of ASIC not to investigate the following charges.

ASIC has made a decision not to support the objective of the Corporations Act (S 435A). ASIC's decision is in contravention of the Law Reform Commission (para 8), which declared that a court winding up of a company was unsatisfactory. Moreover, the Explanatory Memorandum (1992) paragraph 15 states –

“Of particular importance in Part 4 is the new voluntary administration scheme to be set out in new Part 5.3A. The aim of that scheme is to save companies and businesses which are experiencing solvency difficulties, rather than destroy them in the way the current law all too often does. If the new Part is successful in even a small minority of cases, the benefits available, both to the company under administration and to its creditors, will be very significant.”

...2/

“Voluntary administration of insolvent companies” –

Paragraph 21 states –

“Proposed Part 5.3A implements the Harmer Report’s recommendations in relation to the establishment of a new scheme for the voluntary administration of insolvent companies. The Harmer Report recommended a new procedure (based loosely on a United States approach) under which a company in financial difficulties could appoint an administrator.”

The application was based on the Corporations Act.

1317B Applications for review

- (1) Subject to this Part, applications may be made to the Tribunal for review of a decision made under this Act by:
 - (a) the Minister; or
 - (b) ASIC; or
 - (c) the Companies Auditors and Liquidators Disciplinary Board.

- (2) For the purposes of this Act and the *Administrative Appeals Tribunal Act 1975*, ASIC is taken to be a person whose interests are affected by a decision made under this Act by the Companies Auditors and Liquidators Disciplinary Board.

The decision not to support the object of the Act by the Minister, by ASIC, or the company’s auditors and the Liquidators Disciplinary Board is an intention of defeating creditors and shareholders of companies.

The Law Reform Commission (para 139) refers to this as a “fraudulent dispositions”.

“for the purposes of determining whether a transaction was made with the necessary intention, the court should consider, among other things, whether

- *the company was insolvent at or about the time of the transaction or became insolvent as a result of the transaction”.*

The transaction by ASIC to liquidate a company based on a presumption of insolvency is an opinion formed by the appointed liquidator, who becomes a relevant authority and priority creditor in a court winding up (Section 556).

That is where ASIC is using the courts (the law) to destroy companies; thereby defeating the creditors and shareholders of companies like –

(...)

(...)

Status - **UNDER EXTERNAL ADMINISTRATION and/or
CONTROLLER APPOINTED

None of these companies use Part 5.3A and the 17 Divisions, which is there to protect the creditors and employees within these companies.

The Honourable Mr Chris Pearce MP, Parliamentary Secretary to the Treasurer refers to ASIC'S National Insolvency Coordination Unit as having positive outcomes, but Mr Pearce may well ask the affected Westpoint Group investors, who were firstly defeated by the financial planners (unsecured creditors), regulated by ASIC and now by the (relevant authorities) liquidators, regulated by ASIC whether they appreciate this outcome?

Should the Committee require clarification or confirmation of any of the above, please do not hesitate to contact me.

Yours sincerely

A Bittmann

PS The Committee needs to appreciate that under External Administration of insolvent companies an Administrator is deemed an agent of the company, however a Controller is deemed an agent of his appointer.

In the tribunal hearing of 2st August 2006, ASIC was protecting the Controllers.

Cc Jason Wood MP, Federal Member for La Trobe